

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
February 3, 2010 Session

**IN RE: NICKOLAS E.**

**Appeal from the Circuit Court for Coffee County  
No. 37054 William C. Lee, Judge**

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**No. M2009-01888-COA-R3-PT - Filed February 9, 2010**

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Mother appeals the termination of parental rights to her child, asserting that the Department of Children's Services failed to exercise reasonable efforts to assist her in complying with the requirements of the permanency plans entered into as a result of the adjudication that the child was dependent and neglected. Father appeals the termination of his parental rights, asserting that the trial court erred in holding that it would allow a negative inference if Father refused to testify, in finding that Father committed domestic violence against Mother and in finding that Father had the capacity to comply but did not substantially comply with the permanency plans. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Jason L. Huskey, Manchester, Tennessee, for the appellant, Terry E.

Cynthia Cheatham, Manchester, Tennessee, for the appellant, Brandy V.

Robert E. Cooper, Jr., Attorney General and Reporter, and Lauren S. Lamberth, Assistant Attorney General, Nashville, Tennessee, for the appellee, Tennessee Department of Children's Services.

**OPINION**

**I. BACKGROUND**

In this case, Brandy V. ("Mother") and Terry E ("Father") appeal the termination of parental rights to their son, N.E. In December 2007, when N.E. was thirteen months old, the

Department of Children's Services ("DCS") received a referral that there was substance abuse and domestic violence in the home and possible neglect of N.E.; DCS initiated contact with Mother and Father to assess the situation and provide family support services. On March 4, 2008, DCS filed a petition seeking to have N.E. adjudicated dependent and neglected and placed in the temporary custody of DCS. The Coffee County Juvenile Court entered an order placing N.E. in the protective custody of DCS on March 12 and on October 21 entered an order placing temporary custody of N.E. with the Department based, in part, upon Mother's and Father's stipulation that N.E. was dependent and neglected due to domestic violence, substance abuse and medical maltreatment.<sup>1</sup> N.E. was placed in foster care following removal from the home and remained in the foster home through the instant proceedings.

In March 2008 the first permanency plan was adopted with the goal of reunification. The plan allowed for supervised visitation two days per week and, in addition, provided, *inter alia*, that Mother and Father would obtain drug, alcohol, mental health and parenting assessments and follow recommendations; obtain safe and stable housing; obtain domestic violence counseling and anger management treatment; and secure regular employment. The expected achievement date was September 24. The plan was signed by Mother on March 24; Father signed the plan at a later date.

A second permanency plan was adopted in May 2008, adding adoption as an alternative goal and noting efforts Mother and Father were making in complying with the first plan. In addition to retaining the requirements of the first plan, the second plan required that Mother and Father work with the in-home services that were being provided and be more accurate with DCS. The DCS case manager explained that the second plan was prepared because Mother and Father had not used the resources that were being provided and DCS needed to add adoption as a goal. The plan was signed by Mother and Father on May 20.

A third plan was adopted in October 2008, continuing the requirements of the previous plan and focusing on measures for Mother and Father to receive alcohol and drug treatment, specifically in-patient services. This plan was signed by Mother but Father did not attend the meeting where the plan was discussed.

The juvenile court held a permanency hearing on December 4; Mother and Father, as well as their counsel, were present. The court approved the permanency plans and found as follows relative to the parties' compliance with the plans:

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<sup>1</sup> The dependent and neglect hearing was held on July 28.

DCS is in compliance in that it has offered services relative to the needs for the parents set out in the permanency plan; the mother is not in substantial compliance in that she is still testing positive for drugs and has only just attended her first assessment after failing to attend other assessments; the father is not in substantial compliance in that he has not participated in any services provided by the Department.

DCS instituted the proceeding to terminate the parental rights of Mother and Father on February 20, 2009, in the Circuit Court for Coffee County, alleging abandonment by failing to provide a suitable home (Tenn. Code Ann. § 36-1-113(g)(1)), failure to comply with the permanency plans (Tenn. Code Ann. § 36-1-113(g)(2)) and persistence of conditions (Tenn. Code Ann. § 36-1-113(g)(3)(A)). Following a hearing, the court granted the petition on the grounds alleged, finding also that termination was in the best interest of N.E.

## II. STANDARD OF REVIEW

A parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996). Thus, the state may interfere with parental rights only if there is a compelling state interest. *Nash-Putnam*, 921 S.W.2d at 174-75 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Terminating a person's parental rights "has the legal effect of reducing the parent to the role of a complete stranger." *In re W.B., IV.*, No. M2004-00999-COA-R3-PT, 2005 WL 1021618, at \*6 (Tenn. Ct. App. Apr. 29, 2005). Pursuant to Tenn. Code Ann. § 36-1-113(1)(1), "[a]n order terminating parental rights shall have the effect of severing forever all legal rights and obligations of the parent or guardian of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent or guardian."

Our termination statutes identify "those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought." *In re W.B.*, 2005 WL 1021618, at \*7 (citing Tenn. Code Ann. § 36-1-113(g)). To support the termination of parental rights, petitioners must prove both the existence of one of the statutory grounds for termination and that termination is in the child's best interest. *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); Tenn. Code Ann. § 36-1-113(c).

Because of the fundamental nature of the parent's rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding termination cases. *Santosky*, 455 U.S. at 769; *Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Thus, both the grounds for termination and the best interest inquiry

must be established by clear and convincing evidence. Tenn. Code Ann. § 36-3-113(c)(1); *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence “establishes that the truth of the facts asserted is highly probable . . . and eliminates any serious or substantial doubt about correctness of the conclusions drawn from the evidence.” *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004). Such evidence “produces in a fact-finder’s mind a firm belief or conviction regarding the truth of the facts sought to be established.” *Id.*

In light of the heightened standard of proof in these cases, a reviewing court must adapt the customary standard of review set forth by Tenn. R. App. P. 13(d). *In re M.J.B.*, 140 S.W.3d at 654. As to the court’s findings of fact, our review is *de novo* with a presumption of correctness unless the evidence preponderates otherwise, in accordance with Tenn. R. App. P. 13(d). *Id.* We must then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *Id.*

### III. DISCUSSION

#### A. Mother’s Appeal

Mother raises the following issues on appeal:

1. Did the trial court err in finding that the Department of Children’s Services provided reasonable efforts to assist Mother in complying with the parenting plan?
2. Did the trial court err in finding that termination of Mother’s parental rights was in the child’s best interest?

Termination on the ground of substantial noncompliance with the permanency plan implicates DCS’ obligation to demonstrate that it made reasonable efforts to reunite a child with the parent. Tenn. Code Ann. § 37-1-166(b). Reasonable efforts are statutorily defined as the “exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and family.” Tenn. Code. Ann. § 37-1-166(g)(1). The factors courts are to use in determining reasonableness include: (1) the reasons for separating the parents from their children; (2) the parents’ physical and mental abilities; (3) the resources available to the parents; (4) the parents’ efforts to remedy the conditions that required the removal of the children; (5) the resources available to the Department; (6) the duration and extent of the parents’ efforts to address the problems that caused the children’s removal; and (7) the closeness of the fit between the conditions that led to the initial removal of the children, the requirements of the permanency plan, and the Department’s efforts. *In re Tiffany B.*, 228 S.W.3d 148, 158-59 (Tenn. Ct. App. 2007) (citing *In re Giorgianna H.*,

205 S.W.3d 508, 519 (Tenn. Ct. App. 2006)). The reasonableness of the Department's efforts depends upon the circumstances of the particular case. *In re Giorgianna H.*, 205 S.W.3d at 519.

The trial court found the following with reference to DCS' efforts:

The Department of Children's Services provided reasonable efforts to assist the parents in complying with these permanency plans. These efforts included efforts made directly by the case manager Kelly Kazmark and by hired providers. Assistance was offered to the parents to locate substance abuse treatment programs, assisting the parents finding transportation, helping the parents finding substitute housing and helping [Mother] find employment. In-home counselors were employed; beginning three months before the child came into custody, to assist the family in improving parenting techniques.

After the child came into custody therapeutic visitation services were set up so that the parents could continue to learn appropriate ways of caring for the child. The parents' need for substance abuse treatment was addressed by the efforts of the Department. The case manager discussed the need for treatment of their ongoing drug use regularly with the parents and provided assistance in contacting the providers and arranging transportation to the programs. The parents each began programs but failed to complete them. The court finds based upon the testimony of the case manager that the parents were offered assistance in locating alternative treatment programs for substance abuse, but they failed to attend these programs. Substance abuse counselors from Centerstone who worked with the parents testified that transportation was provided to the facilities by Centerstone, which was approximately one mile from the parents' home.

The court finds that the parents were aware of the need to contact Centerstone for anger management counseling, that the Department's case manager had provided information related to this to the parents and that they knew how to contact the agency. Because of the agency's policy that the parents must set up the appointment for treatment, the Department was relieved of further obligations of assisting the parents on [sic] this regard.

The case manager encouraged [Mother] to seek shelter from the domestic violence and based upon her encouragement, [Mother] sought temporary shelter at Shepherd's House, where assistance was available to her in finding employment and living independently. [Mother] left this shelter within an hour of arrival.

The case manager for the Department personally assisted the child's mother in obtaining employment and training was provided to her on how to

apply for a job. [Mother] was even driven by the DCS case manager to an employer to obtain a job. Assistance was also provided to the family to obtain different housing by reviewing with them the local availability of both public and private housing. The parents acknowledged that they knew how to make contact with the various housing providers and did not request further assistance.

In her brief on appeal, Mother does not detail the manner in which she asserts that DCS failed to provide reasonable efforts to assist her in complying with the permanency plans; neither does she argue that the court's findings are not supported by the record. Upon our review of the record, we find that the court's finding that DCS complied with its responsibility is supported by clear and convincing evidence. Moreover, parents have an obligation to "make reasonable and appropriate efforts to rehabilitate themselves and to remedy the conditions that required the Department to remove their children from their custody." *In re Giorgianna H.*, 205 S.W.3d at 519. The court's finding that Mother did not substantially comply with the permanency plan is amply supported by clear and convincing evidence in the record.

Mother's argument that the trial court erred in determining that termination was in the best interest of N.E. is premised on efforts she made to improve her relationship with N.E. The legislature, however, has set out a list of factors for the courts to follow in determining the child's best interest. These factors are:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i). Any conflict between the best interest of the child and the interest of the parent is to be resolved in favor of the child. Tenn. Code Ann. § 36-1-101(d).

The trial court set forth in detail its findings relative to the statutory factors and gave due deference to Mother's relationship with N.E. The findings that Mother had not made such adjustment in her circumstances as to make it safe and in N.E.'s best interest to be in her home, that a lasting adjustment of her circumstances did not appear to be possible, that she continued to use drugs and that N.E. was in a better place with his foster care placement are fully supported by clear and convincing evidence.

## B. Father's Appeal

Father raises the following issues:

1. Did the trial court err when it held that it would allow a negative inference to be drawn if Father did not testify in the matter?
2. Did the trial court err in finding that Father had committed domestic violence against Mother "in contradiction with the testimony of most of the State's witnesses"?
3. Did Father have the capacity to fully appreciate the importance of and to substantially comply with the requirements of the Permanency Plan? In other words, did the trial court err in finding substantial noncompliance with the plan as a grounds against Father?

Father contends that the trial court erred when it ruled that a negative inference would be drawn if Father did not testify. The transcript of the trial shows that the trial court asked Father to call his first witness and that, prior to responding, the court and all counsel held an off-the-record sidebar conference; at the conclusion of the conference Father declined to put

on proof.<sup>2</sup> He was then called as a witness by the guardian *ad litem* and proceeded to testify. The salient discussion at the sidebar, as reflected in the affidavit of Judge Lee was as follows:

The substance of this discussion was whether or not a negative inference could be obtained by the respondent [Father] not taking the stand. Mr. Huskey argued that being a quasi criminal matter that such privilege should be extended; however, I told him that that would not be the case and that any specific questions relating to pending criminal matters could be objected to on Fifth Amendment grounds on a question by question basis.

We find no error in the court's ruling. We concur with the result and reasoning of *State Dep't of Children's Servs. v. F.R.G.*, No. E2006-01614-COA-R3-PT, 2007 WL 494996, at \*10-12 (Tenn. Ct. App. Feb. 16, 2007), that there is no constitutional infirmity in the ability of the trial court to draw a negative inference from the parent not testifying or to consider evidence obtained over the parent's Fifth Amendment objection in a proceeding to terminate that parent's parental rights.

In light of the history of violence between Father and Mother, which was one of the bases upon which N.E. came into custody of DCS, the parenting plans entered into beginning in March 2008, required Father to undergo domestic violence and anger management counseling. Father testified that he did not attend the anger management classes as prescribed and the record shows that in September 2008, he pled guilty to violating the domestic assault statute, Tenn. Code Ann. § 39-13-111. Mother also testified that she and Father "had problems with domestic violence" when they were together and that Father had made comments in the past that made her believe he was going to hurt N.E.; she also testified as to the events leading to Father's arrest in August 2008, which resulted in the September 2008 conviction. Thus, irrespective of the court's allowance of testimony regarding a domestic violence charge against Father which was pending at the time of the hearing, there was clear and convincing proof in support of the court's finding that Father was guilty of domestic assault.

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<sup>2</sup> This Court's knowledge of the factual basis of this issue is gleaned from an affidavit of the trial judge which is included as an appendix to Father's appellate brief. As pointed out by counsel for DCS, the affidavit is not a part of the record on appeal. Rule 24, Tenn. R. App. P., governs matters relating to the appellate record; at no point in the rule is there a provision allowing for what Father has attempted to do in this case. To the contrary, subdivision (e) of the Rule 24 directs what is to happen in the circumstance presented; that procedure was not followed in this case. As a consequence, we ordinarily could not consider the matters set forth in the affidavit in our disposition of this appeal. *See* Tenn. R. App. P. 13(c). Further, inasmuch as the matters occurred during, rather than after trial, the provisions of Tenn. R. App. P. 14 do not apply. In our discretion, however, and in the interest of considering all issues raised by the parties in this appeal, we shall consider the issue raised by Father. *See* Tenn. R. App. P. 2.



Father also raises the question of whether, in light of asserted “cognitive deficiencies,” he had the capacity to appreciate and comply with the requirements of the permanency plan. We have reviewed the testimony cited by Father in support of his contention that he did not understand the plan and could not comply with the requirements; while the witnesses acknowledge that Father functions at a lower cognitive level, there is no proof that he did not have the mental capacity to understand or comply with the requirements of the parenting plan. To the contrary, the record shows that the requirements of the permanency plans, as well as those of the Centerstone treatment center, were developed in consultation with Father and in recognition of the necessity of developing realistic requirements to achieve the outcomes and goals necessary. Moreover, the record does not show that concern regarding Father’s mental capacity was raised at any time, including, but not limited to, the permanency hearing in December 2008. The record is clear that the requirements of the plan were reasonable and that, despite the assistance given to him, Father failed to comply with those requirements, as found by the trial court.

#### **IV. Conclusion**

For the reasons set forth above, the decision of the Juvenile Court is AFFIRMED.

Costs are assessed to Father and Mother, equally.

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RICHARD H. DINKINS, JUDGE